



**U.S. Department of Justice**

*United States Attorney  
Southern District of New York*

*The Silvio J. Mollo Building  
One Saint Andrew's Plaza  
New York, New York 10007*

March 16, 2021

**BY ECF**

The Honorable Vernon S. Broderick  
United States District Judge  
Southern District of New York  
Thurgood Marshall United States Courthouse  
40 Foley Square  
New York, New York 10007

Application for a stay is granted. Defense counsel's response is due by the close of business on March 17, 2021.

**SO ORDERED:**

**HON. VERNON S. BRODERICK 3/16/2021  
UNITED STATES DISTRICT JUDGE**

**Re: *United States v. Ng Lap Seng*,  
S5 15 Cr. 706 (VSB)**

Dear Judge Broderick:

The Government respectfully writes in the above-captioned matter to request:

- (1) an emergency stay of the Court's order of yesterday (Dkt. No. 989 (the "Order")), granting reconsideration of the Court's denial of the defendant's prior motion for compassionate release (Dkt. No. 974), published at *United States v. Ng Lap Seng*, 459 F. Supp. 3d 527 (S.D.N.Y. 2020), and
- (2) reconsideration of that grant in light of the new, material information set forth below (and any additional briefing as the Court believes may assist it in making a decision on the merits).

In the Order, the Court stated: "The Government notes that [the Federal Bureau of Prisons ("BOP")] has begun vaccinating federal prisoners, including those at Defendant's facility, (Doc. 981, at 3), but does not provide any timeline for when, or if, Defendant might be vaccinated or whether or not his vaccination might be delayed because of his immigration status." Order at 8-9. This morning, in connection with the Government advising the BOP of the Order, the Government was informed by the BOP that the defendant declined to be vaccinated against COVID-19 on February 9, 2021, thereafter changed his mind and received his first dose of the Moderna vaccine on February 24, 2021, and is scheduled to receive his second dose next week. Records documenting the defendant's refusal and subsequent vaccination are enclosed.<sup>1</sup>

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<sup>1</sup> The Government did not learn this information until this morning.

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Courts have uniformly—and properly—recognized that a defendant’s refusal to be vaccinated and/or vaccination substantially diminishes any otherwise-applicable basis to be considered for early release in light of the pandemic. *See, e.g., United States v. Poupart*, No. 11 Cr. 116 (JBA), 2021 WL 917067, at \*1 (D. Conn. Mar. 10, 2021) (“The opportunity for individually-identifiable inmates to opt to receive the COVID-19 vaccine represents a sea change from their previous COVID-19 infection vulnerability and inability to protect themselves against the virus, even with comorbidities. Evidence that a defendant has been offered the vaccine, whether he accepts it or not, demonstrates that he had the ability and opportunity to take measures to markedly reduce his risk of severe illness or death from COVID-19 while incarcerated.”); *United States v. Harris*, No. 18 Cr. 628 (JMA), 2021 WL 848865, at \*1 (E.D.N.Y. Mar. 5, 2021) (denying motion for compassionate release in part due to defendant’s receipt of first dose of Moderna vaccine); *United States v. Mason*, No. 96 Cr. 126 (JFK), 2021 WL 793835, at \*2 (S.D.N.Y. Mar. 2, 2021) (“Having now contracted the virus, and received a vaccine against it, the fundamental and overriding purpose of [the defendant]’s initial request for immediate release—*i.e.*, the desire to remove him from an environment where he may contract the virus—is significantly less compelling than when the January 5 Decision concluded that [his] immediate release was not warranted.”); *United States v. Miller*, No. 19 Cr. 245 (KMK), Dkt. No. 143, at 15 (S.D.N.Y. Feb. 19, 2021) (the defendant “has received the two-shot vaccine, which studies show is approximately 95% effective. Thus, even considering [his] medical challenges, he falls far short of establishing extraordinary and compelling circumstances that justify his early release.”); *United States v. Johnson*, No. 94 Cr. 631 (PGG), 2021 WL 640054, at \*5 (S.D.N.Y. Feb. 18, 2021) (defendant had not established extraordinary and compelling reasons to justify his release because he “has recently received a first dose of the COVID-19 vaccine, and he is expected to receive a second dose in the coming weeks. The [d]efendant’s vaccination mitigates the risks that he would otherwise face from the COVID-19 virus.”); *United States v. Pabon*, No. 17 Cr. 312 (JPC), 2021 WL 603269, at \*3 (S.D.N.Y. Feb. 16, 2021) (“any risk that [the defendant] may face from the spread of COVID-19 at Allenwood Low has been greatly reduced because he is now fully vaccinated”); *United States v. Thomas*, No. 11 Cr. 630 (KMK), Dkt. No. 1504, at 8 (S.D.N.Y. Feb. 5, 2021) (the defendant “has received the first dose of the two-dose vaccine, placing ahead of 90% of the country in getting inoculated against COVID-19. Thus, [he] has not met his burden of showing extraordinary and compelling reasons for early release.”); *United States v. Lohmeier*, No. 12 Cr. 1005, 2021 WL 365773, at \*2 (N.D. Ill. Feb. 3, 2021) (collecting cases supporting principle that circumstances are not extraordinary and compelling where defendant refused vaccination); *United States v. Hargrove*, No. 18 Cr. 22 (VLB), 2021 WL 170836, at \*7 (D. Conn. Jan. 19, 2021) (“Vaccination from the virus would undercut the argument that release to home confinement to prevent him from contracting the virus constitutes ‘extraordinary and compelling’ reasons to modify his sentence.”). So too here.

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Accordingly, the Court should grant a stay of its order of yesterday (Dkt. No. 989), granting reconsideration of the Court's denial of the defendant's prior motion for compassionate release, and reconsider that grant in light of the foregoing new, material information.<sup>2</sup>

Respectfully submitted,

ILAN T. GRAFF  
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Acting Under Authority Conferred by 28 U.S.C. § 515

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Enclosure

cc: (by ECF)

Counsel of Record

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<sup>2</sup> Even if the Court is not inclined to grant reconsideration on the merits, in the interest of public health and safety, both of the defendant and the number of individuals with whom he will come in contact while being transferred to and in ICE custody—and while taking a long flight or flights back to Macau, China—the Court should stay its decision for a sufficient period such that the defendant is not released to ICE custody prior to two weeks after receiving his second shot, which is only days away. See Centers for Disease Control and Prevention (“CDC”), *Understanding How COVID-19 Vaccines Work*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/how-they-work.html> (updated Mar. 9, 2021) (“If it has been less than two weeks since your shot, or if you still need to get your second shot, you are NOT fully protected.”); CDC, *Possible Side Effects After Getting a COVID-19 Vaccine*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/expect/after.html> (updated Mar. 10, 2021) (“It takes time for your body to build protection after any vaccination. . . . You should keep using all the tools available to protect yourself and others until you are fully vaccinated.”).

**Bureau of Prisons  
Health Services  
Immunizations**

Begin Date: 03/16/2020      End Date: 03/16/2021  
Reg #: 92441-054      Inmate Name: SENG, NG LAP

<u>Immunization</u>	<u>Immunization Date</u>	<u>Administered</u>	<u>Location</u>	<u>Dosage</u>	<u>Drug Mfg.</u>	<u>Lot #</u>	<u>Dose #</u>	<u>Exp Date</u>
COVID-19 Moderna Vaccine	02/24/2021	Now	Left Deltoid	0.5mL	Other	011A21A	1	08/16/2021
<b>Orig Entered:</b> 02/25/2021 10:08 EST Yordy, A. RN								
COVID-19 Moderna Vaccine	02/10/2021	Refused						
<b>Orig Entered:</b> 02/10/2021 08:35 EST Brown, Desiree RN								
Influenza - Immunization	10/07/2020	Now	Left Deltoid	0.5mL	GSK	9HT27		06/30/2021
Fluarix Quadrivalent								
<b>Orig Entered:</b> 10/07/2020 10:31 EST Yordy, A. RN								
<b>Total: 3</b>								

BP-PENDING

## COVID-19 VACCINE CONSENT – INMATE

CDFRM JAN

U.S. DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF PRISONS

I have been provided a copy of the COVID-19 Vaccine **Emergency Use Authorization (EUA)** fact sheet dated \_\_\_\_\_. I have had the opportunity to ask questions about the benefits and risks of vaccination, including if I am pregnant, breastfeeding or have a weakened immune system. I will agree to complete the number of vaccine doses as appropriate and indicated by the manufacturer.


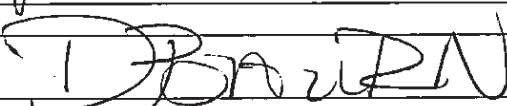
## Health Questions Prior to COVID-19 Vaccination (Check yes or no)

Yes	No	Health Questions
<input type="checkbox"/>	<input type="checkbox"/>	Are you sick today?
<input type="checkbox"/>	<input type="checkbox"/>	Have you ever had a severe allergy (i.e., anaphylaxis) or an immediate allergic reaction of any severity to any component of this vaccine or to a previous dose of this vaccine?
<input type="checkbox"/>	<input type="checkbox"/>	Have you ever had an immediate allergic reaction to any other vaccine/injectable therapy?
<input type="checkbox"/>	<input type="checkbox"/>	Have you had any other vaccinations in the last 14 days?
<input type="checkbox"/>	<input type="checkbox"/>	Have you received monoclonal antibody therapy for COVID-19 in the last 90 days?

☐ I consent to receive the COVID-19 vaccination.

Dose # (1 or 2)	Vaccine Manufacturer	Lot Number	Expiration Date	Route	Deltoid (R) Deltoid (L)
Inmate Signature					Date
Administered by Signature					Date
Administered by (name/title)					

☒ I decline to receive the COVID-19 vaccination.

Inmate Signature	Date
	2/9/21
Witness Signature	Date
	2/9/21
(PRINT) Witness Name	
D. Brown, RN	
FGC Allenwood	

(PRINT) Inmate Name (Last, First)	Register Number	
Seng, Ng	92441-054	
Institution	Unit	Work Assignment
LSCI		

DOCUMENT VACCINE ADMINISTRATION IN BEMR FLOW SHEETS.

SCAN VACCINE CONSENT IN BEMR DOCUMENT MANAGER – VACCINATION CONSENT